IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3166 OF 2006

SGS India Pvt. Ltd. S.G.S. House
4-B, Aadi Shankaracharya Marg,
Vikhroli (West), Mumbai-400 083. ..Petitioner

V/s.

1. Assistant Commissioner of
Income-tax -10(3) (1),
Room No.456, 4th Floor,
Aayakar Bhavan, M.K. Marg,
Mumbai - 400 020.

2. Union of India,through
the Secretary, Ministry of
Finance, North Block,
New Delhi - 110 001. ..Respondents

Mr.P.J. Pardiwala with Atul Jaswani for the petitioner.

Mr.A.M. Kotangale for the respondents.

CORAM : DR.S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.

RESERVED ON : 6TH FEBRUARY,2007.

PRONOUNCED ON : 13TH FEBRUARY, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. Rule. Rule, Returnable forthwith. By consent of the parties, the Writ Petition is taken up for final hearing.

2. In this petition, petitioner has challenged the notice dated 25th May, 2005 issued under Section

148 of the Income Tax Act, 1961 (‘the Act’ for short) whereby the assessment for AY 2001-02 is sought to be reopened. The petitioner has also challenged the order dated 21st November, 2006 passed by the assessing officer rejecting the objections filed by the petitioner for reopening the assessment.

3. The petitioner carries on business of providing verification, inspection and certification of services in India. On 30th October, 2001, the petitioners filed its return of income for AY 2001-02 declaring the taxable income of Rs.8,42,67,317/-. Subsequently, the petitioner revised its return to income to Rs.8,19,03,180/- on account of change in the depreciation claim.

4. The return of income filed by the petitioner was duly processed under section 143(1) of the Act vide intimation dated 24/4/2003. Lateron the return of income was taken up for scrutiny and a detailed questionnaire was issued on 21st October, 2003 calling upon the petitioner to furnish the details of various expenses incurred, the documents evidencing the nature of the expenses under the provisions of the Act. By the said questionnaire, the petitioner was specifically called upon to give details and justification of the payment relating to

the technical know-how team and research and development expenses. Accordingly, the petitioner furnished the particulars.

5. By an assessment order dated 11/2/2004 passed under section 143(3) of the Act, the assessing officer disallowed part of the technical know-how team and allowed the deduction of research and development fees as claimed by the petitioner.

6. By the impugned notice dated 25th May, 2005 issued under Section 148 of the Act, the assessing officer sought to reopen the assessment for AY 2001-02 by recording reasons, which read thus :

> "1. In your case, an order under section 92CA(3) for the assessment year 2002-03, was received from the Addl.Commissioner of Income-tax (Transfer Pricing)-2, Mumbai on 23.3.2005, in which the Addl.C.I.T. TP-2, has held that R & D Expenditure amounting to Rs.2.87 crores was paid to SGS Switzerland towards common Research & Development. The benefit of which were stated to be shared by all the Associated concerns global. However, the Addl. C.I.T., TP-2, Mumbai, after detailed investigation held that the transactions entered into by the assessee company with its associate in Switzerland was not Arms' Length and was disallowed. Considering the fact that the similar payment was made under the head "Research & Development" amounting to Rs.1.47 crores in the relevant assessment year that is 2001-02, by virtue of the finding of the Addl. C.I.T., TP -2, Mumbai, this payment to SGS Switzerland, would have to be disallowed. Therefore, I have reasons to believe that your company by having claimed wrongful expenses has suppressed total income and thus has evaded tax.

> 2. In view of the Explanation 2(c)(1) u/s. 147 of the I.T. Act, 1961, I have reason to believe that the income chargeable to tax has escaped assessment for the A.Y. 2001-02 and hence proposed to proceed to tax the said amount.
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> 3. For necessary compliance, a notice u/s.143(2)/142(1) is being issued along with this letter. You are requested to furnish the above mentioned details called for in my office at Aayakar Bhavan, Room No.473, M.K. road, Churchgate, Mumbai - 20, within 7 days from the receipt of this letter.

7. The petitioner filed objections to the reopening of the assessment on 11th September, 2006. It was contended that the assessment order for AY 2001-02 was passed after detailed enquiry and the reopening of the assessment based on the assessment order for AY 2002-2003 is improper because, the law for AY 2002-03 was totally different. However, by the impugned order dated 21st November, 2006, the assessing officer rejected the objections raised by the petitioner. Challenging the said notice dated 25th may, 2005 and the order dated 21st November, 2006 rejecting objections, the petitioner has filed present petition.

8. Mr.Pardiwala, learned counsel appearing on behalf of the petitioner submitted that in the present case, there was full disclosure of the material relating to research and development fees and after a detail enquiry, the assessing officer

had allowed the
said expenses. Therefore, in the absence of any reason to belive that the income has escaped assessment, the impugned notice issued under Section 148 of the Act for reopening the assessment for AY 2001-02 cannot be sustained.

9. Mr.Pardiwala further submitted that from the reasons recorded by the assessing officer, it is seen that the assessment is sought to be reopened solely based on the assessment order passed for the AY 2002-03 wherein the research and development expenses incurred have been disallowed on the ground that the same were not at Arms Length as contemplated under Section 92CA(3) of the Act. Mr.Pardiwala submitted that the special provisions relating to avoidance of tax enacted by Finance Act, 2001 came into force with effect from 1st April, 2002 and were applicable for and from AY 2002-2003. Therefore, reopening of the assessment for AY 2001-02 based on the assessment order for AY 2002-03 is wholly unjustified.

10. Relying upon a full bench decision of the Delhi High Court in the case of CIT V/s. Kelvinator of India Limited (256 ITR 1) and two decisions of this Court in the case of German Remedies Ltd. V/s. DCIT (285 ITR 26) and CIT V/s. Smt.Maniben V. Shah

(283 ITR 453), Mr.Pardiwala submitted that mere change of opinion cannot form the basis for reopening a completed assessment. Accordingly, Mr.Pardiwala submitted that none of the jurisdictional conditions being fulfilled, the impugned notice is liable to be quashed and set aside.

11. Mr.Kotangale, learned counsel appearing on behalf of the respondent, on the other hand, submitted that in the present case, the reopening of the assessment is not based on the law which came into force with effect from 1st April, 2002 but is based on the basis of the material gathered from the assessment order for AY 2002-03.

12. Relying upon the decision of the Delhi High Court in the case of Consolidated Photo Finvest Limited V/s. ACIT reported in 151 Taxman 41 (Delhi), decision of the Apex Court in the case of Ess Ess Kay Engineering Co. P. Limited V/s. CIT reported in 247 ITR 818 and a decision of the Apex Court in the case of CIT V/s. P.V.S. Beedieo Pvt. Ltd. reported in 237 ITR 13, Mr.Kotangale submitted that the action under Section 147 is permissible even if the assessing officer gathered his reasons to believe from very same record as had been subject matter of completed assessment proceedings.

13. We have carefully considered the rival submissions. In the present case from the reasons recorded for reopening the assessment, it is evident that the reasons to believe that the income has escaped assessment are based on the findings recorded in the assessment order for AY 2002-03. In the assessment order for AY 2002-03, the research and development expenses incurred by the petitioner in AY 2002-03 have been disallowed partially on the basis of the findings recorded by the Transfer Pricing Officer to the effect that the transactions were not at arms length as contemplated under the Transfer Pricing Regulations. As rightly contended by Mr.Pardiwala, Transfer Pricing Regulations came into force w.e.f. 1st April, 2002 and, thus, the said Regulation was not applicable to the AY 2001-02. Therefore, reopening of the assessment for AY 2001-02 based on the provisions which were not applicable for AY 2001-02 cannot be sustained.

14. The contention of the revenue that the assessing officer has only relied upon the material available from the assessment order for AY 2002-03 cannot be accepted, because what is held in the assessment order for AY 2002-03 is that the transactions were not at arms length as per the provisions which are applicable to AY 2002-03. It

is not the case of the assessing officer that the deduction allowed in the assessment order passed under Section 143(3) of the Act is contrary to any provisions applicable to AY 2001-02. Thus, in the facts of the present case, apart from the assessment order for AY 2002-03, there are no other reasons for reopening the assessment. Admittedly, the expenses in question have been incurred after obtaining FIPB approval and approval from the R.B.I. Therefore, reopening of the assessment for AY 2001-02 on the ground that the transactions are not at arms length is without any merit. The decisions relied upon by the counsel for the revenue are distinguishable on facts, because, in all those cases there were no change in law in the subsequent assessment years and, therefore, reason to believe that income has escaped assessment could be gathered from the subsequent assessment orders. In the present case, the law in the subsequent year being different, reopening of the assessment based on the subsequent assessment order cannot be sustained.

15. In this view of the matter, the reopening of the assessment for AY 2001-02 on the ground that transactions were not at Arms Length as held in the assessment order for AY 2002-03 cannot be sustained.

16. Accordingly, the petition succeeds. The

impugned notice dated 25th May, 2005 is quashed and set aside. Rule is made absolute in terms of this order with no order as to costs.

(DR.S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)